Roderick M. Thompson (State Bar No. 96192)
rthompson@fbm.com
Robert C. Holtzapple (State Bar No. 145954)
bholtzapple@fbm.com
Helen Dutton (State Bar No. 235558)
hdutton@fbm.com
Diego F. Acevedo (State Bar No. 244693)
dacevedo@fbm.com
Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480

Attorneys for Plaintiff
VISA U.S.A. INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VISA U.S.A. INC.,

Plaintiff,

vs.

MARITZ INC., d/b/a MARITZ LOYALTY MARKETING,

Defendant.

Case No. CV-07-5585 JSW

NOTICE OF MOTION AND MOTION TO STAY ACTION AND TO COMPEL ARBITRATION

Date: February 8, 2008
Time: 9:00 a.m.
Courtroom: 2 (17th Floor)
Hon. Jeffrey S. White

NOTICE OF MOTION AND MOTION

On February 8, 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 2, 17th Floor, before the Honorable Jeffrey S. White, Plaintiff Visa U.S.A. Inc. ("Visa") shall and hereby does move the Court, pursuant to the Sections 3 and 4 of the Federal Arbitration Act, for an order staying this action and compelling Defendant Maritz, Inc. d/b/a Maritz Loyalty Marketing ("Maritz") to arbitrate. This Motion is based upon this Notice of Motion and Motion, the following Memorandum of Points and Authorities, the Declaration of Roderick M. Thompson filed herewith, all files and records in this action and such additional matters as may be judicially noticed or may come before the Court prior to or at the hearing on this matter.

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

SUMMARY OF ARGUMENT

Maritz breached its contractual obligation to develop and deliver a time-critical software program to Visa for use during the critical 2006 holiday season. Visa terminated Maritz in April 2007, and disputes regarding the parties' respective performance under that contract arose. Visa and Maritz entered a three-stage Letter Agreement (including negotiation, mediation and arbitration) to resolve efficiently their "respective claims for damages resulting from alleged breaches" of that contract and all "related claims" outside of court. A few weeks later, when confronted with the magnitude of damages it had caused, Maritz abruptly tried to change course. For the last six months, Maritz has sought to avoid arbitration and to delay resolution through its assertion that its Associate General Counsel did not understand the significance of what he signed. By this motion, Visa asks the Court to stay this action and to let the arbitration proceed.

Maritz cannot dispute that both parties signed the Letter Agreement and that it covers both their claims. Because the Letter Agreement covers a unified dispute resolution framework, Maritz's "challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator[,]" not the Court. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006). In any event, because the Letter Agreement incorporated the AAA Commercial Rules, which expressly give the arbitrator the power to rule on validity challenges to the arbitration agreement, the prevailing federal rule (followed by courts in this district) is that Maritz must present any contention that it was fraudulently induced to enter the Letter Agreement to the arbitrator. *See Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 207 (2d Cir. 2005). The Court need determine only that a *prima facie* agreement to arbitrate the parties' claim exists in this case. *See Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989).

Alternatively, if the Court determines the issue of arbitrability, it need determine only that (1) an enforceable arbitration agreement exists between the parties; and (2) the claims at issue are covered by the Letter Agreement. *See* 9 U.S.C. § 4; *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). There can be no realistic dispute either that the Letter Agreement is unenforceable, or that it does not cover the existing claims.

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

TABLE OF CONTENTS

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

STATE CASES

FEDERAL STATUTES

OTHER AUTHORITIES

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

Pursuant to an Agreement dated April 17, 2006 (the "April 17 Agreement"), Maritz was obligated to develop, deploy, operate and maintain for Visa and its member banks a points-based rewards program for use by Visa cardholders. The April 17 Agreement required that Maritz launch the rewards program no later than September 30, 2006. The April 17 Agreement clearly states that failure to meet the September 30, 2006 Launch Date would cause severe damage to Visa. In addition to stating that "Time is of the essence of this Agreement," the April 17 Agreement provides for liquidated damages of $70,000 per day of delay in the Launch. The April 17 Agreement also states that "Maritz acknowledges that the successful completion of each Deliverable in accordance with the Milestone Schedule is critical to the commercial viability of the Rewards Program." (Declaration of Roderick M. Thompson ("Thompson Decl."), Ex. A.) Maritz, nevertheless, failed to meet the September 30, 2006 deadline. Indeed, despite continuing to work on the project, Maritz never launched the rewards program.

Pursuant to a letter dated April 20, 2007, Visa terminated the April 17 Agreement. In its April 20, 2007 letter, Visa expressly "reserve[d] all rights relating to or arising out of the [April 17, 2006] Agreement and any Related Agreement, including, without limitation, **claims Visa has against Maritz for Maritz's breaches of the Agreement** (including any Related Agreement), Maritz's non performance or delay in performing any obligations due under the Agreement (including any Related Agreement), and **Visa's right to liquidated damages** [up to $70,000 per day] pursuant to section XXIII.R of the Agreement." (*See* Thompson Decl., Ex. B.) (emphasis added)

Maritz responded in a letter dated May 7, 2007, claiming that Maritz was itself owed more than $5 million. In that letter, Maritz wrote: "As Visa has reserved all of its rights relating to or arising out of the Agreement or any Related Agreement, Maritz does the same." (*See* Thompson Decl., Ex. C.) By letter dated June 5, 2007, Visa responded that it "anticipates providing additional information to Maritz as to the nature and amount of Visa's claims at the appropriate time." (*See* Thompson Decl., Ex. D.) Visa explained that once the transition to the new vendor

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

was complete, "we will be prepared to discuss your letter as part of the process for resolving our claims." On July 2, Visa wrote another letter, reiterating its commitment to discuss "Maritz's claims, as well as the nature and amount of Visa's claims," and that "[i]t is now timely to establish a procedure for **efficiently documenting, discussing and resolving all remaining claims**." (Thompson Decl., Ex. E) (emphasis added.) In particular,

> [Visa] proposed a staged process. The first stage would be direct negotiations. If the parties are unable to reach a mutually agreeable resolution through negotiation, the second stage would be non-binding meditation. Finally, if the claims are not resolved in mediation, the parties will submit the matter to confidential and binding arbitration. It is important to have this agreement on process in place before we commence negotiations so that both sides will know the alternative to a negotiated resolution.

Visa asked Maritz to have Maritz's legal counsel contact Visa's counsel "to establish a mutually acceptable procedure." (*Id*.) (emphasis added.)

In early July 2007, Maritz's Associate General Counsel contacted Visa's outside counsel to negotiate a dispute resolution process. Following that discussion, Visa and Maritz agreed to memorialize a three-step dispute resolution process. Visa's outside counsel sent the Letter Agreement to Maritz's Associate General Counsel on July 9, 2007. (Thompson Decl., Ex. F.) On July 10, 2007, Maritz's Associate General Counsel sent an e-mail to Visa's outside counsel returning a fully-executed copy of the Letter Agreement and stating, in part, that "attached is an executed agreement outlining the procedures ***for resolving any differences that may exist between Visa and Maritz***." (Thompson Decl., Ex. G, ¶ 8.) (emphasis added)

A few weeks after signing the Letter Agreement, Maritz's Associate General Counsel asked Visa for an estimate as to the size of Visa's claim; Visa's outside counsel responded by saying that Visa's claim was considerable and in the range of tens of millions of dollars. (Thompson Decl., ¶ 9.) Maritz's Associate General Counsel expressed surprise at the magnitude of Visa's damages claim and then said that, although he was not accusing Visa's counsel of trying to deceive him or of having said anything that was inaccurate, Maritz would engage outside counsel. (*Id.)* On July 23, Maritz's Associate General Counsel e-mailed Visa's outside counsel proposing that the parties agree that the "previous [Letter] [A]greement was null an [sic]

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

void. . . ." (Thompson Decl., Ex. H.) Visa did not agree. Maritz's Associate General Counsel continued to maintain this position in an August 8, 2007 e-mail, stating "I will remind you that Maritz originally agreed to arbitrate without **ANY** understanding of the magnitude of Visa's purported claims and as I have said to you repeatedly there was no meeting of the minds between Maritz and Visa with respect to the circumstances surrounding Maritz' agreement to mediate." (Thompson Decl., Ex. I.) (emphasis in original) Although Visa's outside counsel responded that he "disagree[d] with Maritz' position that the attached July 9, 2007 [L]etter [A]greement is not enforceable," Maritz held fast stating, "Although I suppose it goes without saying, we do disagree with your view of the binding effect of the [L]etter [Agreement] you attached." (Thompson Decl., Ex. J, Aug. 21 Thompson e-mail, Aug. 22 Gallant e-mail, respectively.)

On November 2, 2007, Visa submitted an arbitration demand to the AAA. (Thompson Decl., Ex. K.) Maritz responded to the AAA on November 16, 2007 that it disputes the validity of the Letter Agreement and refuses to submit to the jurisdiction of the AAA. (Thompson Decl., Ex. L.) Maritz wrote again to the AAA on November 26, claiming that the Letter Agreement is invalid and unenforceable; in a shift from its prior position that there had been "no meeting of the minds," Maritz now contended that the Letter Agreement had been "induced by [Visa's outside counsel] and Visa's fraudulent conduct and deceit" (Thompson Decl., Ex. M.) In particular, Maritz now claims that Visa's "failure" to disclose the magnitude of its damages claim was an omission of material fact. Moreover, and only after Visa's outside counsel raised the *Buckeye Check Cashing* argument, Maritz changed its position, narrowly taking issue with only "the arbitration clause in the [L]etter [A]greement" now claiming this provision "was induced by [Visa's outside counsel] and Visa's fraudulent conduct." (*Id.*) On November 30, the AAA rejected Maritz's procedural challenge, directed the arbitration to proceed, and provided that any jurisdictional challenges could be raised to the arbitrator. (Thompson Decl., Ex. N.) Undeterred, Maritz again wrote to the AAA objecting to any further action by the AAA in the administration of the arbitration. Despite Maritz's repeated objections, the AAA again rejected Maritz's procedural challenge on December 13 and has directed the arbitration to proceed with the locale as San Francisco. (Thompson Decl., Ex. O.)

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

II. ARGUMENT

The Federal Arbitration Act ("FAA") governs the Letter Agreement. 9 U.S.C. § 1 *et seq*. The present agreement involves "commerce" within the meaning of the FAA, where the underlying dispute relates to a contractual dispute regarding Maritz's development, deployment, operation and maintenance of a points-based rewards program.

Under the FAA, a written provision "in any . . . contract . . . involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA was enacted to overcome the reluctance of some courts to enforce arbitration agreements. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995). The FAA establishes a federal policy in favor of arbitration. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

The United States Supreme Court has directed federal courts to "rigorously enforce" arbitration agreements. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985); *Shearson/ American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24-25 (1983).

A. This Case Should Be Stayed Pending the Arbitration And The Court Should Compel Maritz To Arbitrate

Section 3 of the FAA provides that a district court "upon being satisfied that the issue involved in [a] suit or proceeding is referable" to arbitration, shall "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." *See Lloyd v. Hovensa, LLC*, 369 F.3d 263, 269 (3d Cir. 2004) (stay mandatory once court compels arbitration); *see also Way Services, Inc. v. Adecco N. Am. LLC*, 2007 WL 1775393 at *4 (E.D. Pa. Jun. 18, 2007) (staying action pending arbitration of arbitrability issue). For the reasons discussed below in Sections B and C, this matter encompasses Visa's claims and Maritz's counterclaims and is referable to arbitration. This case, including both Visa's claims and Maritz's counterclaims, therefore, must be stayed until the arbitration has been had.

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

A court must compel arbitration if the parties have in fact agreed in writing to arbitrate the claims pending before it. 9 U.S.C. § 4; *Dean Witter Reynolds*, 470 U.S. at 218 (district court had no discretion once it determined that written agreement to arbitrate existed). Where, as here, the validity of the Letter Agreement is an issue for the arbitrator to decide, the Court need only determine that a *prima facie* agreement to arbitrate the parties' claim exists. *See Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989). Authorized representatives from both Visa and Maritz signed the Letter Agreement. (Thompson Decl., Ex. F.) Indeed, Maritz has admitted in its Answer that it signed the Letter Agreement. (*See* D.E. #19, ¶ 23.) Further, the Letter Agreement expressly encompasses the parties' "respective" contract claims and all "related" claims. Accordingly, on its face, the Letter Agreement reflects a *prima facie* agreement to arbitrate.

B. Questions Regarding Arbitrability Must Be Submitted To The Arbitrator

1. The Arbitrator Must Determine the Arbitrability Issue, Because Maritz's Challenge Is to the Entire Letter Agreement, Not Just the Arbitration Provision.

Maritz first argued that the entire Letter Agreement was "null an [sic] void," that there was no "meeting of the minds," and therefore the Letter Agreement was neither binding nor enforceable. (*See* Thompson Decl., Ex. H and Ex. L, respectively.) Based on these statements, Visa pointed out to the AAA that Maritz's challenge was to the validity of the entire Letter Agreement and that under *Buckeye Check Cashing Inc*., "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." 546 U.S. at 445-46. (Thompson Decl., Ex. P.)

Upon learning of Visa's *Buckeye Check Cashing* argument, however, Maritz changed course. In its December 3, 2007 letter to the AAA, Maritz alleged "that the arbitration provision in the [L]etter [A]greement itself was induced by [Visa's outside counsel] and Visa's fraudulent conduct . . . ." Notwithstanding these "*ad hoc* arguments of counsel," the parties' contemporaneous correspondence compels the conclusion that Maritz took issue with the ***entire*** Letter Agreement. *See Jones v. Merrill Lynch*, 604 So.2d 334, 337 (Ala. 1991) (rejecting Plaintiff's later-developed argument and observing that "a skillfully crafted complaint would, in

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

every case, necessitate a trial [instead of arbitration] thus effectively eviscerating the FAA and circumventing the strong policy favoring arbitration"). As in *Jones*, "[t]he ability of competent counsel to sharpen the issue relating to the arbitration clause progressively over time is readily apparent," and is likewise unavailing here. *Id*. at 338. The Court should reject Maritz's "cynical attempt to avoid th[e] [*Buckeye*] rule by simply adding a cause of action challenging the validity of the arbitration clause" where the contemporaneous correspondence demonstrates that Maritz took issue with the entire Letter Agreement, not merely the arbitration provision. *See Susai v. Jagadeesh*, 2007, WL 1742870, at *6 (N.D. Cal. June 14, 2007).

In addition, Maritz's belated attempt to attack only "the arbitration provision" is ruled out by the Letter Agreement itself. Simply put, there is no separable "arbitration provision." The parties agreed to a unified dispute resolution framework. To wit, the opening paragraph of the Letter Agreement provides: "[w]e agreed that our clients' respective claims for damages resulting from alleged breaches of the Agreement and related claims will all be resolved outside of court," according to the "dispute resolution framework" set forth therein. (Thompson Decl., Ex. F.) Additionally, the parties agreed that "further details on the dispute resolution process will need to be worked out," and if "they are unable to agree on any aspect of the procedure," it will be resolved under applicable AAA "rules and procedures." The entire agreed-upon dispute resolution framework, therefore, is itself the subject of the pending arbitration. Accordingly, there is no separable "arbitration provision." No matter how Maritz casts and recasts its arguments, any alleged fraud in the inducement challenge is necessarily a challenge to the validity of the entire Letter Agreement.[1]

[1] Visa raises to the Court's attention *Santana Row Hotel Partners, L.P., v. Zurich Am. Ins. Co.*, in which that Court held that a party's fraudulent inducement defense to a stand-alone arbitration agreement was a challenge to the entire agreement, and therefore an issue for the Court to decide. 2007 WL 914464 at *2 (N.D. Cal. March 20, 2007). Although the Letter Agreement here is distinguishable from the arbitration agreement in *Santana Row*, Visa respectfully submits that the *Santana Row* Court's interpretation of *Buckeye Check Cashing* regarding severability is mistaken. *See id*.

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

2. In Any Event, The Letter Agreement Incorporates the AAA Rules, Which Provide that the Validity of the Letter Agreement Is for the Arbitrator.

Incorporation of the AAA Rules in the Letter Agreement evidences the parties' intent to submit issues of arbitrability to the arbitrator. The FAA requires that the parties' agreement to arbitrate be enforced as written. In *First Options of Chicago, Inc. v. Kaplan*, the United States Supreme Court held that "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." 514 U.S. 938, 943 (1995). Thus, where "there is clear and unmistakable evidence" that the parties agreed to arbitrate arbitrability, the court will compel the parties to honor that agreement. *PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1191 (9th Cir. 2004); *see also Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002).

"The weight of authority in the federal courts *overwhelmingly* supports the [] conclusion" that incorporation of arbitration rules constitutes clear and unmistakable evidence that the parties intended to submit arbitrability issues to the arbitrator. *Avue Techs. Corp. v. DCI Group, LLC*, 2006 WL 1147662 at *6 (D.D.C. Apr. 28, 2006) (emphasis added); *see also Way Services, Inc.*, 2007 WL 1775393 at *4 ("Considering this relevant case law, the Court is persuaded that the *prevailing* rule across jurisdictions is that incorporation by reference of rules granting the arbitrator the authority to decide questions of arbitrability – especially the AAA rules – is clear and unmistakable evidence that the parties agreed to submit arbitrability questions to the arbitrators. *More importantly, the Court is convinced that California law has adopted this rule*.") (emphases added). Indeed, the vast majority of the Circuit Courts of Appeal has adopted this rule. *See e.g., Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005) ("By incorporating the AAA Rules, including Rule 8 [, now Rule 7], into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid."); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208, 209 (2d Cir. 2005) ("when . . . parties explicitly incorporate rules that empower an arbitrator to decide

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator").[2]

Courts of this district have similarly followed this prevailing rule: "where the parties' agreement to arbitrate includes an agreement to follow a particular set of arbitration rules – such as the ICC Rules – that provide for the arbitrator to decide arbitrability," issues regarding arbitrability are decided by the arbitrator. *Poponin v. Virtual Pro, Inc.*, 2006 WL 2691418 *1, 9 (arbitration agreement incorporating ICC rules; issues regarding arbitrability reserved for arbitrator); *see also Packeteer Inc. v. Valencia Sys. Inc*., 2007 WL 707501 *1, 2 (N.D. Cal. March 2007) (Whyte, J.) (finding "that because it incorporates the rules of the American Arbitration Association, the agreement to arbitrate is sufficiently broad as to give the arbitrator the authority to determine arbitrability of issues"); *Anderson v. Pitney Bowes, Inc*., 2005 WL 1048700, *1, 2-4 (N.D. Cal. 2005) (citing with approval *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 557 (2004) (holding clause specifying that arbitration would be "in accordance with the AAA Commercial Arbitration Rules" constituted clear and unmistakable evidence that parties intended arbitrator rather than court determine arbitrability)).

Although Maritz contends that "there is no arbitration agreement that would empower arbitrators to determine the validity or enforceability of any arbitration agreement" (Thompson

---

[2] *See also Qualcom Inc. v. Nokia Corp*., 466 F.3d 1366, 1373 (Fed. Cir. 2006) (concluding "that the 2001 Agreement, which incorporates the AAA Rules containing the same language as that in *Contec*, clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator"); *P & P Indus., Inc. v. Sutter Corp*., 179 F.3d 861, 867-68 (10th Cir. 1999) (finding that when a party incorporates the AAA rules by reference, it is bound by all of the procedural rules of the AAA); *Rainwater v. Nat'l Home Ins. Co*., 944 F.2d 190, 193-94 (4th Cir. 1991) (finding, before *First Options*, that a reference to AAA rules in an arbitration agreement incorporates all of those rules by reference); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) ("By contracting to have all disputes resolved according to the Rules of the ICC . . . , Apollo agreed to be bound by Articles 8.3 and 8.4. These provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a prima facie agreement to arbitrate whose continued existence and validity is being questioned.") *Commonwealth Edison Co. v. Gulf Oil Corp*., 541 F.2d 1263, 1272-73 (7th Cir. 1976) (same); *Bryson v. Gere*, 268 F. Supp. 2d 46, 52-53 (D.D.C.2003) (finding, post-*First Options*, that a reference to AAA rules in an arbitration agreement incorporates all of those rules by reference, but without discussion of the "clear and unmistakable evidence" standard); *Bayer CropScience, Inc. v. Limagrain Genetics Corp. Inc*., 2004 WL 2931284, at *4 (N.D. Ill. Dec. 9, 2004) ("The inclusion of the phrase '[t]he arbitration shall be conducted . . . in accordance with the prevailing commercial arbitration rules of [AAA]' . . . is clear and unmistakable evidence that the issue of arbitrability is to be submitted to the arbitrator."); *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc*., 203 F.R.D. 677, 685 (S.D. Fla. 2001) (holding agreement's incorporation of AAA rules "provide[s] clear and unmistakable evidence that the parties agreed to arbitrate arbitrability"), *aff'd on other grounds*, 312 F.3d 1349 (11th Cir. 2002).

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

Decl., Ex. G), the weight of authority proves Maritz wrong.[3] Here, the one-and-a-half-page Letter Agreement incorporates the AAA rules **twice.** First, the Letter Agreement unequivocally provides that the parties' disputes shall be resolved through "[b]inding arbitration pursuant to the AAA Commercial Rules." (Thompson, Decl., Ex. F.) Second, the Letter Agreement also provides that "[t]o the extent [the parties] are unable to agree on any aspect of the procedure, such disagreement will be resolved by the applicable rules and procedures of the American Arbitration Association ('AAA')." (Thompson Decl., Ex. F.) In relevant part, the AAA Commercial Rules provide: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." AAA Commercial Rule R-7(a). Thus, by incorporating AAA's Commercial Rules – including Rule R-7(a) – the parties "clearly and unmistakably" agreed to reserve to the *arbitrator* the power to rule on any objection Maritz may have as to the validity or enforceability of the Letter Agreement.

Based on the same facts, this Court (Hamilton, J.) found in *Poponin*: "[T]his court has no subject matter jurisdiction to determine arbitrability. By agreeing to arbitration under the ICC Rules, Dr. Poponin and Virtual Pro clearly and unmistakably agreed that questions of arbitrability would be submitted to arbitration." 2006 WL 2691418 at *9. The same result is required here: because Maritz undeniably agreed to arbitration under the AAA's rules, questions of arbitrability must be submitted to the AAA.

C. Alternatively, If the Court Decides the Issue of Arbitrability, Maritz Should Be Compelled to Arbitrate, Because The Letter Agreement Is Both Valid and Covers the Disputes between the Parties.

Alternatively, if the issue of the Letter Agreement's validity is not reserved for the arbitrator, Maritz must nonetheless be compelled to arbitrate. In ruling on a petition to compel arbitration the Court considers only two questions: (1) whether an enforceable arbitration agreement exists between the parties; and (2) whether the claims at issue are covered by the

[3] Maritz neither identified nor distinguished any of this contrary authority in its December 20, 2007 Motion to Stay despite being on notice of the majority of these cases from Visa's initial Petition to Compel, filed before Magistrate Zimmerman on November 28, 2007 as well as from Visa's letters to the AAA.

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

arbitration agreement. See 9 U.S.C. § 4; *Chiron Corp*., 207 F.3d at 1130. Once the Court determines that there is an arbitration agreement that applies to the dispute, the Court's work ends. *See Dean Witter Reynolds*, 470 U.S. at 218. Here, both requirements are met.

1. The Letter Agreement Is Valid and Enforceable.

The parties negotiated, drafted and entered the Letter Agreement *after* the disputes between the parties had arisen. (*See* Thompson Decl., Ex. B, Ex. C, and Ex. D.) Both parties were represented by counsel during the bargaining process. When Maritz's Associate General Counsel signed and returned the Letter Agreement, Maritz undeniably indicated that there had been a meeting of the minds with respect to the Letter Agreement.

Nevertheless, Maritz initially claimed that the Letter Agreement was unenforceable because there was "no meeting of the minds." This argument is premised on Maritz's Associate General Counsel's alleged *subjective* and unexpressed understanding that Visa's claim would not be large.[4] But where, as here, the parties' objective acts make their intent to enter the Letter Agreement plain, subjective intent is not relevant. *See, e.g., Warehousemen's Union Local No. 206 v. Continental Can Co., Inc.*, 821 F.2d 1348, 1350 (9th Cir. 1987) ("where there are objective manifestations of the parties' intent to create a contract, the court need look no further"). Further, Maritz's argument that "had [its Associate General Counsel] known all of the purported facts at the time he entered into the Agreement, he would not have done so" cannot defeat the arbitration. *Susai v. Jagadeesh*, 2007 WL 1742870, at *6 (N.D. Cal. June 14, 2007) (granting petition to compel arbitration).

Perhaps understanding that the "no meeting of the minds" argument was unsupportable, Maritz now claims it was "fraudulently induced" into the Letter Agreement. This argument too must fail. Fraud based on concealment or nondisclosure is not actionable unless there is a duty to disclose. *Chase Chem. Co. v. Hartford Accident & Indem. Co*., 159 Cal. App. 3d 229, 243

[4] Importantly, Martiz cannot claim that its Associate General Counsel did not know Visa had claims: not only was the fact that Visa had claims against Maritz clearly and repeatedly expressed in Visa's correspondence with Maritz, but also in his cover e-mail returning the fully executed Letter Agreement, Maritz's Associate General Counsel wrote that the Letter Agreement expressed "the procedures for resolving **any differences that may exist between Visa and Maritz**." (Thompson Decl, Ex. G.) (emphasis added)

(1984). A duty to disclose a material fact normally arises only where there exists a confidential relation between the parties. *Shafer v. Berger, Kahn, Shafton, Moss, Figler & Gladstone*, 107 Cal. App. 4th 54, 71 (2003). Here, *after* disputes between the parties had arisen, Maritz's Associate General Counsel negotiated the Letter Agreement with Visa's outside counsel; Maritz cannot contend that Visa's outside counsel had a confidential relationship with Maritz. Moreover, it remains a matter of general contract law that "[a] party making a contract is not expected to tell all that he knows to the other party, even if he knows that the other party lacks knowledge on some aspects of the transaction." *Toledano v. O'Connor*, 501 F. Supp. 2d 127, 145 (D.D.C. 2007); Restatement (Second) of Contracts § 161 cmt. A; *see also* 26 Williston on Contracts § 69:16 (4th ed.) ("It is settled that there is no general requirement of full disclosure of all relevant facts in every business relationship and consequently agreed by the majority of jurisdictions that, at least in courts of law, it is not necessarily fraudulent for one party to a bargain consciously to take advantage of the ignorance or mistake of the other party by failing to disclose material facts, provided no words or acts of the party who failed to disclose the fact in question contribute to the mistake, and there is no duty existing between the parties that compels disclosure of the facts. . . .").

In addition, even if Visa had a duty to disclose, Maritz's newly-crafted fraud in the inducement is belied by the contemporaneous correspondence between the parties and their legal counsel. In the termination letter to Maritz, dated April 20, 2007, Visa informed Maritz that Visa was reserving all rights relating to or arising out of the Agreement including claims Visa had against Maritz for Maritz's breaches of the Agreement and Visa's right to liquidated damages. Maritz knew that liquidated damages accrued at a rate of $70,000.00 per day and that Visa's April 2007 termination of Maritz was over six months after the September 2006 Launch Date. (*See* Thompson Decl, Ex. A.) Maritz was therefore on notice that Visa claims based on liquidated damages alone could range in the tens of millions. On July 2, 2007, Visa again wrote Maritz explaining that Visa would discuss Maritz's claims as well as the nature and amount of Visa's claims after the parties had established "a procedure for efficiently documenting, discussing and resolving all remaining claims." (See Thompson Decl, Ex. E.) The Letter Agreement also

specifically states "we agreed that our clients' **respective claims for damages** resulting from alleged breaches of the Agreement and related claims will all be resolved outside of court." (emphasis added). Given this series of communications, Maritz knew or should have known that Visa would be seeking damages and not simply setoffs to Maritz's claim of five million dollars. In fact, if Maritz had conducted a simple, superficial, and conservative calculation of the liquidated damages that Visa might claim for Maritz's failure to launch the system between September 30, 2006 and April 20, 2007 (as required under the April 17 Agreement), Maritz would have known that Visa was claiming at least ten million dollars. Given these contemporaneous communications, Maritz cannot show that it actually relied on Visa's silence regarding the size of its claim, or that such reliance was reasonably justified.[5]

2. The Letter Agreement Applies to the Parties' "Respective Claims For Damages" and "Related Claims."

Maritz may contend that the Letter Agreement does not cover the disputes raised by Visa's arbitration demand or by Maritz's counterclaims. Any such contention would be baseless.

"[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). California law also has a strong "preference for arbitration, and the concomitant rule that arbitration should be upheld unless it can be said with assurance that an arbitration clause cannot reasonably be interpreted to cover a dispute." *Segal v. Silberstein*, 67 Cal.Rptr.3d 426, 432-433 (Cal. App. 2d October 29, 2007) (reversing trial court's denial of petition to compel arbitration even though arbitration clause was deemed "poorly worded"). Broad arbitration clauses, such as the one here, apply so long as the factual allegations underlying a claim "touch matters" covered by the contract. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.13 (1985); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999).

[5] Even if Visa owed Maritz a duty to disclose, in order to prevail on a claim for fraud in the inducement Maritz must also, *inter alia*, prove materiality and intent. Visa will address these elements and the aforementioned elements of duty and reliance in its opposition to Maritz's Motion to Stay Arbitration. As is clear from the parties' contemporaneous correspondence, however, Maritz cannot establish its reliance was justified.

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400

Here, the plain and unambiguous language of the Letter Agreement provides: "We agree[] that [Visa's and Maritz's] ***respective claims for damages*** resulting from alleged breaches of the [April 17] Agreement ***and related claims*** will ***all*** be resolved outside of court." (Thompson Decl., Ex. F, Letter Agreement (emphasis added).) The inclusion of the words "respective" and "related" demonstrates that the scope of the Letter Agreement applies to both parties' claims. Maritz simply cannot credibly claim that the Letter Agreement does not cover the parties' respective disputes surrounding the performance of the April 17 Agreement and all counterclaims asserted by Maritz against Visa.

III. CONCLUSION

For the foregoing reasons, Visa respectfully requests that the Court issue an Order (a) staying this entire action, including Maritz's counterclaims, and (b) compelling Maritz to submit to arbitration, in accordance with the Letter Agreement.

DATED: January 4, 2007

FARELLA BRAUN & MARTEL LLP

By: /s/
Roderick M. Thompson

Attorneys for Plaintiff
VISA U.S.A. INC.

Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4400